# B. Trial Issues Subcommittee

## 1. Purpose

The Trial Issues Subcommittee considered issues related to trials in capital cases. The Subcommittee considered qualifications for trial defense counsel, the need for state-wide trial and appellate public defender offices to represent indigent capital defendants, later notice by the prosecution of intent to seek the death penalty to give both the defense and prosecution time to submit and review evidence, and the procedure for conducting the aggravation/mitigation and sentencing hearings. At the request of defense attorneys, the Subcommittee also considered whether law enforcement officers should be required to electronically record statements made to them by suspects in capital cases.

## 2. Issues for Consideration

The Subcommittee identified these issues for study:

1. Are the qualifications for trial counsel, as specified in Ariz. R. Crim. P. 6.8 sufficient?

2. Are the disclosure requirements imposed on the State by Ariz. R. Crim. P. 15.1(g)(2) sufficient?

3. Are the disclosure requirements imposed on the defense by Ariz. R. Crim. P. 15.2(g)(1) sufficient?

4. Are there ways to improve the existing procedures for the aggravation/mitigation hearing – Ariz. R. Crim. P. 26.3(c)?

5. Does the existing system adequately provide for mitigation experts?

6. Are there possible way to improve the manner of funding the costs of lawyers and experts for both the prosecution and the defense?

7. Are statutory or rule changes desirable to better implement the rights of victims under Article II, Section 2.1, Arizona Constitution, and A.R.S. § 13-4401 et seq., in capital cases?

8. Are victims adequately heard at trial and sentencing?

9. Does it take too long to investigate and try a capital case? If so, what reforms would reduce the time necessary to process these cases?

The Subcommittee decided to add several issues to its consideration:

1. Should all statements taken in capital cases be recorded?

2. Should Ariz. R. Crim. P. 19.4 be amended to permit jury deliberation prior to the close of evidence?

## 3. Discussion and Recommendations

a) Competence of Counsel

The issue of trial defense counsel competence and the proposal for a statewide capital trial defender office was debated at every meeting of the Subcommittee. The qualifications for appointed and retained counsel were also debated at length. The need for qualified public defenders for capital cases in rural Arizona was well documented by Subcommittee members, and the problem of inadequate funding was restated as the obvious roadblock to the availability of counsel. Rural county members agreed that Ariz. R. Crim. P. 6.8 required two qualified counsel in every capital case, but made clear that recruiting such counsel from an urban area cost the rural counties a lot of money in fees, travel and expenses. Local defense counsel is preferred by the Subcommittee.

On November 14, 2000, the Subcommittee reached a consensus that there is a need for a state-wide capital trial defense office in Arizona to serve the rural counties especially. This recommendation was communicated to the Commission and the Direct Appeal and Post-conviction Relief Subcommittee.

In January 2001 the Subcommittee debated a peer review process to ensure competent trial counsel on the defense side. The Subcommittee concluded that, by and large, Ariz. R. Crim. P. 6.8 ensured competent trial defense attorneys in capital cases, but that the Subcommittee should explore a peer review program to ensure competence of retained and appointed counsel. After the February and March meetings, the Subcommittee concluded that peer review was not workable, and declined to endorse a peer review program for capital cases. The Subcommittee recommended that the trial judge should set a status conference early in the trial preparation stage in the case in order to assess whether the defense attorneys are qualified under Ariz. R. Crim. P. 6.8. This status conference should also be used to ensure schedules are being met to protect the victim's right to a speedy trial.

The Data and Research Subcommittee reported the following data regarding the defense attorneys who appeared in the 230 capital cases from 1974 through July 1, 2000. The attorneys included public defenders, court appointed private counsel, and retained counsel. The number of remands and reversals or modifications in these cases are also reported and

these data appear in Exhibit 24 of the Data Set I Research Report.
In the March 22, 2001 meeting the Subcommittee again deliberated on the issue of competency of defense attorneys and in particular dealt with issues raised by the full Commission in its previous meeting. In particular, the Commission raised the following four questions for debate:

1. Should an attorney whose performance is found to have been inadequate or deficient in a capital case by any court be removed from the list of eligible counsel under Ariz. R. Crim. P. 6.2 and 6.8?

2. Should an attorney whose performance is found to have been inadequate or deficient not be appointed under Ariz. R. Crim. P. 6.2 or 6.8 until the attorney completes 12 hours of continuing legal education on capital litigation?

3. Should an attorney whose performance is found to have been inadequate or deficient be reported to the Arizona Supreme Court, the Presiding Judges of the Superior Court in each County, and the State Bar of Arizona?

4. Should attorneys who admit that they performed inadequately in a capital case be reported to the Arizona Supreme Court, the Presiding Judges of the Superior Court in each County, and the State Bar of Arizona?

The Subcommittee concluded that, as to questions 1 through 4, an attorney whose performance has been inadequate should not automatically be removed from the list of eligible counsel, or automatically required to undergo continuing legal education. Judges and lawyers in such a case should comply with their duties under Ethical Rule 8.3 which requires reporting of another lawyer's conduct to the State Bar when the reporting lawyer has actual knowledge of a violation of the Rules of Professional Conduct, and that violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Subcommittee believes that the Bar and the criminal justice system may properly rely on the duty to report imposed by the ethical rules. The Subcommittee believes there is no duty to report inadequate or deficient performance in a capital case or any other criminal case to the county authority which appoints and employs counsel representing indigent defendants. The Subcommittee does not believe that there needs to be any recommendation to judges or attorneys that they report such conduct to the county's indigent defense authorities.

5. What role should the state public capital defender play in evaluating the performance of private and public defense counsel in capital cases?

As to question 5, the Subcommittee believed that the State Capital Public Defender should play no role in evaluating the performance of private and public defense counsel, and that the reporting requirements under Ethical Rule 8.3 are more than adequate to ensure that lawyers

who do not render competent representation are reported to the Bar, disciplined where appropriate, undergo continuing legal education where appropriate, and that their future employment should be left in the hands of the appointing authorities in each of the counties. The Subcommittee emphasized to the Commission that the reporting under Ethical Rule 8.3 should be on a case-by-case basis, and that a particular finding by a trial or appellate court that an attorney's performance may have been inadequate does not in and of itself require reporting under ER 8.3.

Nevertheless, the Subcommittee did fashion a recommendation for the full Commission which addresses competence of trial defense counsel in capital cases. The Subcommittee recommends that Ethical Rule 1.l, Competence, be amended to specifically require attorneys to meet the standards set forth in Ariz. R. Crim. P. 6.8. Because the standards in Ariz. R. Crim. P. 6.8 have gained universal acceptance by the courts and criminal bar as necessary to ensure adequate representation of capital defendants, these standards should apply to all counsel in capital cases and not just counsel appointed by the court under Ariz. R. Crim. P. 6.8 to conduct indigent defense. The Subcommittee recommends Ethical Rule 1.1 be amended to read:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN ARIZ. R. CRIM. P. 6.8 REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Subcommittee also recommended that the Comment to ER 1.1 be amended to include this best practice advice:

> BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMENDS TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS ARE ADVISED TO ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE [IN TRIAL PROCEEDINGS].

**b) Notice of Intent to Seek the Death Penalty under Ariz. R. Crim. P. 15.1(g)**

The Subcommittee considered extending the time for notice of intent to seek the death penalty and recommended on November 14, 2000 to the Commission that the time for filing the notice be extended to 90 days after arraignment with stipulations by the parties to extend the time further if approved by the trial court.

### c) Aggravation/Mitigation and Sentencing Hearings in Capital Cases

At five meetings, the subcommittee debated extensively the proper role of victim impact evidence. On January 18, 2001, the Subcommittee recommended to the Commission that trial judges hear victim impact evidence during the aggravation and mitigation hearing well before sentencing the defendant using the special verdict form. To provide context for the victim impact evidence in capital cases, the victims in the 230 cases in which the death penalty was imposed from 1974 to 2000 have been profiled. The findings are reported in Exhibit 33 of the Data Set I Research Report.

After further meetings in February, March and May, the Subcommittee refined its recommendations and recommended that the Commission approve a proposed amendment to Ariz. R. Crim. P. 26.3. The rule will outline the sequence of the aggravation/mitigation and final sentencing hearings, and specify that the victim will be heard along with the defendant's allocution at the aggravation/mitigation hearing. The rule will state that the completion of the sentencing process will take place at the final sentencing hearing, and that hearing will occur no earlier than 7 days after the aggravation/mitigation hearing is held.

The proposed rule change recommended by the Subcommittee reads:

**Ariz. R. Crim. P. 26.3. Date of Sentencing; Extension**

(Proposed language appears in uppercase)

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c. Capital Case.

(1) Upon a determination of guilt in a capital case, the trial court shall set a date for the aggravation/mitigation hearing if the state, pursuant to Ariz. R. Crim. P. 15.1(g)(4), is not precluded from and is seeking the death penalty. The penalty hearing shall be held not less than 60 days nor more than 90 days after the determination of guilt unless good cause is shown. Upon a showing of good cause, the trial court may grant additional time for the hearing subject to the limitation of subparagraph (2) below.

(2) A pre-aggravation/mitigation conference shall be held after the return of a guilty verdict of first degree murder in a capital case no more than 10 days before the aggravation/mitigation hearing.

(3) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE VICTIM, AS DEFINED IN A.R.S. §13-703(H)(2), TO PRESENT TESTIMONY OR INFORMATION REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE TRIAL COURT SHALL CONSIDER THE INFORMATION

PRESENTED BY THE VICTIM IN ACCORDANCE WITH THE PROVISIONS OF A.R.S. §13-703(D).

**Ariz. R. Crim. P. 26.3 (continued)**

(4) AT THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL ALLOW THE DEFENDANT THE RIGHT OF ALLOCUTION.

(5) UPON COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, THE TRIAL COURT SHALL SET A DATE FOR THE RETURN OF THE SPECIAL VERDICT AND SENTENCING. THE RETURN OF THE SPECIAL VERDICT AND SENTENCING SHALL OCCUR NO EARLIER THAN 7 DAYS AFTER THE COMPLETION OF THE AGGRAVATION/MITIGATION HEARING, TO ENSURE THAT THE TRIAL COURT HAS ADEQUATE TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT TO CONSIDER THE EVIDENCE, INFORMATION, AND ARGUMENTS PRESENTED AT THE AGGRAVATION/MITIGATION HEARING.

The Rule comment will set forth in detail a procedure which should be employed in a capital case sentencing to ensure that victims' rights are accorded and that the defendant's constitutional rights under *Payne v. Tennessee*, 501 U.S. 808 (1991), are fully accorded. Finally, on this topic, the subcommittee recommends that the Supreme Court's Administrative Order 94-16 be amended to provide to probation officers and pre-trial service officers appropriate guidance as to how to conduct interviews of victims in capital cases when the statements of victims are precisely delineated in A.R.S. § 13-703. The purpose of amending the Administrative Order 94-16 is to ensure that probation officers and pre-trial services officers do not raise unrealistic expectations for the victim's families in capital cases when the Eighth Amendment of the United States Constitution and the decisions of the United States Supreme Court limit some recommendations that the victim may make regarding the sentence in a capital case. Taken together, the Comment and Administrative Order 94-16 will ensure an orderly sentencing procedure in a complicated and emotionally difficult area of the law.

The proposed Comment will state:

**Proposed Comment to 2001 Amendment to Rule 26.3 (c)**

(This portion of the comment contains all new language)

THE 2001 AMENDMENT ADDED SUBSECTION (3), (4), AND (5) TO RULE 26.3(C) REGARDING CAPITAL CASES. RULE 26.3(C)(3) IS INTENDED TO CLARIFY THAT VICTIMS IN A CAPITAL CASE HAVE A RIGHT TO PRESENT TESTIMONY AND INFORMATION AT THE AGGRAVATION/MITIGATION HEARING REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIMS, AND TO HAVE THAT INFORMATION CONSIDERED BY THE COURT IN MAKING THE CAPITAL SENTENCING DECISION. RULE 26.3(C)(3) IS INTENDED TO BE CONSISTENT WITH

THE 1999 AMENDMENT TO A.R.S. § 13-703, AND WITH *PAYNE V. TENNESSEE*, 501 U.S. 808, 111 S.CT. 2597 (1991), HOLDING THAT THE EIGHTH AMENDMENT DOES NOT PROHIBIT

**Ariz. R. Crim. P. 26.3 (continued)**

STATES FROM ALLOWING EVIDENCE AT THE SENTENCING PHASE ABOUT THE MURDER VICTIM AND THE IMPACT OF THE CRIME ON THE VICTIM'S FAMILY. *PAYNE* OVERRULED *BOOTH V. MARYLAND*, 482 U.S. 496, 505 (1987), IN WHICH THE COURT HELD THAT THE INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE SENTENCING PHASE OF A CAPITAL CASE VIOLATED THE EIGHTH AMENDMENT. *PAYNE* DID NOT, HOWEVER, OVERRULE *BOOTH* TO THE EXTENT *BOOTH* PROHIBITED EVIDENCE REGARDING FAMILY MEMBERS' OPINIONS ABOUT THE DEFENDANT OR WHETHER A DEATH SENTENCE SHOULD BE IMPOSED.

UNDER RULE 26.3(C)(3), THE COURT MUST ALLOW THE VICTIM IN A CAPITAL CASE, AS DEFINED IN A.R.S. §13-703(H)(2), TO PRESENT INFORMATION AT THE AGGRAVATION/MITIGATION HEARING REGARDING THE MURDERED PERSON AND THE IMPACT OF THE MURDER ON THE VICTIM AND OTHER FAMILY MEMBERS. THE COURT MUST CONSIDER THE INFORMATION PRESENTED BY THE VICTIM IN EVALUATING THE MITIGATING CIRCUMSTANCES, AS PROVIDED IN A.R.S. §13-703(D). BECAUSE OF EIGHTH AMENDMENT CONCERNS, HOWEVER, COURTS CANNOT CONSIDER VICTIM'S RECOMMENDATIONS [Committee's Minority Language would read: VICTIMS SHOULD NOT MAKE ANY RECOMMENDATION] WITH RESPECT TO THE CAPITAL SENTENCING DECISION. IF THE DEATH PENALTY IS NOT IMPOSED, VICTIMS MAY COMMENT ON, SPEAK TO , OR MAKE RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCING OPTION UNDER A.R.S. §13-703, NATURAL LIFE OR LIFE WITH THE POSSIBILITY OF PAROLE. LIKEWISE, VICTIMS MAY COMMENT ON, SPEAK TO , OR MAKE RECOMMENDATIONS REGARDING THE APPROPRIATE SENTENCE ON THE NON-CAPITAL COUNTS.

UNDER RULE 26.3(C)(4), THE DEFENDANT SHOULD BE AFFORDED THE RIGHT OF ALLOCUTION AT THE AGGRAVATION/MITIGATION HEARING TO ALLOW THE COURT AN OPPORTUNITY TO CONSIDER THE DEFENDANT'S STATEMENT PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT.

UNDER RULE 26.3(C)(5), THE COURT MAY NOT PROCEED TO SENTENCING IMMEDIATELY UPON CONCLUSION OF THE AGGRAVATION/MITIGATION HEARING. RULE 26.3(C)(5) WAS INTENDED TO ALLOW SUFFICIENT TIME PRIOR TO THE PREPARATION OF THE SPECIAL VERDICT FOR THE COURT TO CONSIDER ALL THE INFORMATION PRESENTED AT THE AGGRAVATION/MITIGATION HEARING, INCLUDING ANY VICTIM IMPACT INFORMATION PROVIDED FOR IN SUBSECTION

(C)(3) AND THE DEFENDANT'S STATEMENT PROVIDED FOR IN SUBSECTION (C)(4).

The Subcommittee also recommended that Administrative Order 94-16 be amended to conform to the proposed Rule 26.3 and the new Comment. Administrative Order 94-16 with proposed amendments appears at Appendix D, paragraph 9.

### d) The Use of Mitigation Specialists and Standards for Mitigation Specialists

The Subcommittee discussed the use of mitigation specialists and mitigation evidence in general at each of its meetings. The Subcommittee reached a consensus early on that the development of mitigation evidence should begin as soon as the attorneys are appointed or retained for the capital case. The Subcommittee believed that the defense team cannot wait for a guilty verdict to begin this important work. On January 30, 2001, the Subcommittee recommended that the Commission issue best practice advice to the bar which encourages the defense to start gathering mitigation evidence immediately after appointment both to eliminate some of the delay in the system and to ensure the defense could use the evidence at sentencing and in discussions with the prosecutor about seeking the death penalty.

At its February and March, 2001 meetings, the Subcommittee discussed the need for appointment of mitigation specialists in capital cases, and the need for standards for such specialists. The Subcommittee encouraged the defense bar to use such an expert in every capital case, and encouraged the defense bar to report any trial court's denial of a motion to appoint a mitigation specialist in a capital case to the elected County Attorney responsible for the prosecution.

Finally, on March 22, 2001, the trial subcommittee deliberated on the appointment of mitigation specialists and their qualifications, and the Subcommittee decided to recommend that the full Commission support an amendment to Ariz. R. Crim. P. 15. The proposed rule provides that indigent defendants may apply for the assistance of investigators, expert witnesses, or mitigation specialists to be paid at county expense when reasonably necessary. The proposed rule change also defines mitigation specialist and the rule as proposed reads as follows:

Ariz. R. Crim. P. 15.9 Appointment of Investigators and Expert Witness for Indigent Defendants

a. An indigent defendant may apply for the assistance of an investigator, expert witness, or mitigation specialist to be paid at county expense if the defendant can show that such assistance is reasonably necessary to adequately present a defense at trial or sentencing.

b. An application for the appointment of investigator or expert witnesses pursuant to this Rule shall not be made ex parte.

c. As used in the Rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigating evidence.

### e) Audio or Video Recording of Interrogations

In October of 2000, the Arizona Attorneys for Criminal Justice identified 30 issues to the Subcommittee for discussion. One of the issues was the recording of all interrogations, statements or confessions by law enforcement officials. After extended debate, the Subcommittee recommended on February 22, 2001 to the Commission that all law enforcement agencies in Arizona be encouraged to record all statements by suspects when feasible. Finally, the Subcommittee noted in its March meeting that the Attorney General has already met with her law enforcement advisory Subcommittee to raise the issue. The Attorney General will work with her law enforcement advisory Subcommittee and develop a protocol which recommends recording by law enforcement in all criminal cases of all advice of rights, waiver of rights, and questioning of suspects when feasible to do so.

### f) Jury Deliberation in Criminal Trials before Evidence is Closed

The Subcommittee discussed a pending Petition to Amend Ariz. R. Crim. P. 19.4 on jury deliberations. The Subcommittee noted that deliberations prior to instructions by the judge has not yet been approved by the United States Supreme Court and that the jury would discuss the prosecution evidence first because of the sequence of the criminal trial. The sequence alone may give the prosecution an unfair advantage. The Subcommittee quickly reached a consensus and on January 18, 2001, recommended that the Commission oppose the Petition to Amend Ariz. R. Crim. P. 19.4. The Subcommittee opposes any rule which allows jury deliberation in criminal cases before all evidence is closed and final arguments are made.

### g) Race as a factor in Selecting Death Penalty Cases

The Subcommittee requested data from the Data and Research Subcommittee on the issue of race as it related to the 230 cases in which the death penalty was imposed since 1974. The results are found in Exhibits 35 and 36 of the Data Set I Research Report. The Subcommittee issued no recommendations on this topic pending review of Data Set II which will allow a comparison of capital and non-capital cases.

### h) Other Issues

Throughout its deliberations the Subcommittee addressed these issues:

1. Jury sentencing.

2. Recruiting public defenders in the rural counties.

3. Review of the 7 capital cases which resulted in acquittal on retrial. These cases are the only ones out of 230 cases from 1974 to 2000 in which the defendant was found not guilty on retrial.

4. Residual doubt as a mitigating circumstance.

5. Ongoing Review by Commission members of the 71 cases in which there were remands, reversals, or modifications resulting in life sentences or a term of years. Cases in which the defendant was resentenced to death after a retrial or resentencing are now being reviewed by the Commission.

6. Whether A.R.S. § 13-703 should be expanded to add mitigating circumstances to those that currently exist.

7. A judge selection panel which would approve death penalty notices filed by prosecutors.